

November 3, 1950
Op. No. 50-243

LAW LIBRARY

Mr. Warren McCarthy
County Attorney
Maricopa County Courthouse
Phoenix, Arizona

ARIZONA ATTORNEY GENERAL

Attention: Mr. Jones

Dear Mr. McCarthy:

We have your oral request for our opinions on the following questions:

1. When an elector places a cross in the square at the top of the column under the name of the party designation and for whose candidates he wishes to vote and then makes his cross opposite the name of a candidate for the same office in another party column on the ballot, does this invalidate the entire ballot or should the election officers disregard only the vote for both candidates for that office?
2. When an elector marks his cross in a party column at the top of the ballot showing the names of the candidates for the Republican Party and in which column the Republican Party has no nominee for some particular office, and the elector places his cross opposite the name of a person whose name appears as a candidate of the Democratic Party for that office, should the vote be counted for the individual who is indicated as the elector's choice for that particular office?

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To illustrate, the Republican Party has no nominee on the ballot for State Auditor, while the Democratic Party has a candidate for the office in its column. If a person makes his cross in the square at the top of the Republican Party column and then places a cross opposite the name of the Democratic nominee for that office, should the vote be counted as a vote for the candidate whose name appears in the Democratic column?

Answering your first question we direct your attention to the following sections of the 1939 Code:

Sections 55-410 and 55-412 require boards of supervisors to furnish to the election officers printed instructions, to be placed in the voting booths. Subdivision 1 of said section 55-410 is as follows:

"If you wish to vote a straight ticket put an 'X' in the square at the top of the column under the name of the party for whose candidates you wish to vote."

Subdivision 2 of said Section 55-412 is as follows:

"The voter will then repair to a booth provided for that purpose, and there mark or stamp his ballot. If he wishes to vote a straight ticket he may place a cross in the square at the top of the column under the name of the party and for whose candidate he wishes to vote, otherwise he will mark his ballot with an 'X' in the square opposite the name of each candidate whose name is

printed on the ballot for whom
he desires to vote."

Section 55-507 is in part as follows:

"On receiving his ballot the
voter shall * * * prepare his
ballot and vote in the manner
and substantial form as re-
quired in the instruction to
voters. * * *"

Section 55-509 reads in part as follows:

"If the voter marks more names
than there are persons to be
elected to an office, or if
from the ballot, it is impossi-
ble to determine the voter's choice
for an office, his ballot shall
not be counted for such office.
* * *" (Emphasis supplied)

In Section 55-706 we find this language:

"If on any ballot the names of
more persons are designated for
the same office than are to be
chosen * * * all the names
designated for such office shall
be rejected." (Emphasis supplied)

The two sections last referred to do not provide that
the entire ballot be rejected, but that the vote shall not
be counted for the office for which two candidates are voted.

Under these sections, when an elector places his cross
at the top of a party column it has the same effect as if he
had made his cross opposite the name of each candidate ap-
pearing therein, and if the elector places a cross opposite
the name of another candidate whose name appears in another
party column, he attempts to vote for two candidates for the
same office.

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Your first question was before our Supreme Court in the case of Hunt v. Campbell, 19 Ariz. 254, 169 Pac. 596, wherein the court said:

"The trial court did not err in ruling that ballots having a cross in the square at the top of the Democratic party column and a cross in the square after the name of appellee in the Republican column should not be counted either for contestant or contestee. This method of marking a ballot is in direct violation of the statute, being a vote for two opposing candidates for the same office. The statute penalizes the voter for thus marking his ballot by forbidding it to be counted for the office. Paragraphs 2859 and 2979, Civil Code 1913.

'As we have said, the circle mark being of equal significance with the cross mark opposite the name, the corollary of that, and the equivalent statement that the voter has distinctly expressed his intent to vote for two men, is that, so far as that part of the ballot is involved, it becomes impossible to determine the elector's choice, and such a vote or votes must not be counted for either candidate.' State Ex rel. Brooks v. Fransham, 19 Mont. 275, 48 Pac. 1.

'A cross in the circle conclusively means a vote for the whole ticket printed below it, and a mark in the square before a name on another ticket has no effect other than to nullify the vote for the officer thus doubly voted for.'" (Emphasis supplied)

Therefore, it is our opinion that a ballot marked in the manner indicated in your first question should not be rejected in its entirety, but should be counted as votes for all candidates in the party column, except as to the candidate for the office for which the elector has voted for two candidates, and as to that office the vote should not be counted for either candidate.

As to your second question, if the Republican Party ticket had a complete list of candidates in its party column, the answer to your first question would answer the second, but, inasmuch as the Republican Party column does not have a complete list of candidates for all the offices to be filled, a different situation is presented.

In passing on the validity of a ballot the courts give weight to the intention of the elector, and if it can be determined from the ballot the elector's choice, the courts will give effect to such intent. This policy is declared in Section 55-706 of the Code and in the Hunt v. Campbell case.

We are unable to find any express statutory provision for guidance. In Hunt v. Campbell a somewhat similar situation was considered by the court. In 1916 there appeared on the ballot party columns for three parties, Democratic, Republican and Prohibition. The columns for Democratic and Republican parties had candidates for governor, the Prohibition party had no candidate for that office. In several instances the electors marked a cross at the head of the column for the Democratic and Prohibition columns. The court held that inasmuch as there was no candidate listed for the Prohibition party the vote for governor should be counted for the Democratic candidate. In the opinion the court said:

" * * * Likewise the ruling of the court is approved where votes were counted for contestant and contestee respectively where ballots have a cross in the square at the top of the Prohibition column and a cross in the square after either the name of contestant or contestee where no name as a candidate for Governor on the Prohibition ticket was printed upon the ballot. * * *"

In the case of Spurrier v. McLenan, 115 Iowa, 461, 88 N.W. 1062, approved in the Hunt v. Campbell case, the court said:

"Upon the ballot sheet appeared tickets of the Prohibition and Socialist Labor parties. Neither of these contained county tickets. Several of these tickets were marked in the circle, and a mark also placed in the square opposite the name of incumbent on the Republican ticket. These ballots were counted for the incumbent, and this action of the canvassing board was sustained by the district court.

* * * * *

Such a cross cannot indicate a vote for an office that is left blank upon that ticket. If these tickets had contained the name of a nominee for the office of clerk of the district court, and the voters, after marking the circle, had put a cross in the square preceding the name of incumbent on the Republican ticket, they would have voted for two candidates for an office to which but one could be elected, and for such officer their votes could not be counted. But this reason does not apply in such a case as that now before us. The crosses in the circles were not votes for clerk of the district court, because the name of no candidate for that place appeared below them. The only votes for such officer were those indicated by the crosses in the square before incumbent's name, and we think they were rightly counted for him."

In Parker v. Orr, 158 Ill. 609, 41 N.E. 1002, 30 L.R.A. 227, also approved in the Hunt v. Campbell case, this language is used:

" * * * In these the voters made a well-defined cross in the Democratic or Republican circle at the head of the ticket (four in each), but also made a cross in another circle opposite a party name on which there was no candidate for superintendent of schools. While such ballots could not be counted for candidates upon both tickets, because the voter in that case marked more names than there were persons to be elected to the office, that rule cannot apply to these candidates,-- that is to say, where a voter made a cross in the Republican circle and did the same in the Independent Republican circle, on which last-named ticket there was no candidate for superintendent of schools, he did not mark more names than there were persons to be elected to that office, but expressed his choice for Miss White. And so where a voter made a cross in the Democratic circle but did the same in the People's silver circle, on which there was no candidate for the office, the vote should have been counted for Orr."

If a person votes a straight Republican ticket, and there is no candidate for State Auditor on that ticket, he has not voted for a candidate for that office; he is entitled to vote for some one for the office, and if he finds the name of a candidate for the office in another party column he may indicate his choice by placing his cross after the name of the candidate for the office in another column, or he may write in the name of a candidate in the Republican column and make his cross opposite the name. In either event the result is the same, as the votes are counted for the candidate for a particular office and not as a representative of a party.

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Therefore it is our opinion if an elector places a cross at the top of a party column and then places a cross opposite the name of a candidate for an office in another party column, when there is no candidate for that particular office in the column over which the elector placed his cross, that such vote should be counted as a vote for the candidate for the office named in the other column.

Very truly yours,

FRED O. WILSON
Attorney General

EARL ANDERSON
Assistant Attorney General

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